IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.10.2007

CORAM:

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.No.134 of 2007

The Board of Trustees of the
Port of Chennai,
Rajaji Salai, Chennai-600 001,
rep. by its Chairman .. Appellant

Vs.

M/s.X Press Container Line (UK) Ltd.,
S.P. Center "B" Wing,
41/44, Minoo Desai Marg,
(Behind Radio Club) Coloba,
Mumbai-400 001.
rep. by its Regional Representative,
Capt.S.P.Rao .. Respondent

Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 against the order of the learned Arbitral Tribunal comprising of Hon'ble Mr.Justice Malai Subramanian (Retd.), Mr.V.Subramanian and Mr.T.R. Gopalakrishnan, dated 11.10.2006.

For Appellant : Mr.V.T.Gopalan,
Additional Solicitor General of India,
assisted by
Mr.P.Wilson,
Assistant Solicitor General of India

For Respondent : Mr.T.Poornam

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JUDGMENT

The Civil Miscellaneous Appeal is filed against the order of the learned Arbitral Tribunal dated 11.10.2006.

2. The facts arising out of this appeal are as under:-

The Board of Trustees of the Port of Chennai, the appellant herein, is a statutory authority duly constituted under the Major Port Trusts Act, 1963 having the office at Rajaji Salai, Chennai-600 001. The respondent is a Feeder Operator engaged in the carriage of goods by sea with its

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registered office at England and Wales and with a place of business in India. The appellant, with the consultation of Ministry of Shipping, introduced a Berth Reservation Scheme for container vessels. In pursuance of this scheme, the appellant and the respondent entered into a Berth Reservation Agreement dated 18th January 1995 under which the appellant agreed to provide the respondent with a reservation of 200 metres of berth length at West Quay I and II, Dr.Ambedkar Dock. The respondent, as licensee, obtained a reservation of the 200 metres of berth together with a back-up area for an initial tenure of 2 years for the purpose of berthing, discharging and loading cargo. The appellant as well as the respondent subsequently extended the term of the agreement from 25th September 1997 until 24th December 1997 and again from 25th December 1997 until 31st March 1998. Article I of the agreement deals with Definitions and Interpretations. Article II of the agreement deals with Term and Termination. Article III of the agreement deals with Licence and Authority. Article IV of the agreement deals with Guaranteed Productivity. Article V of the agreement deals with Insurance and Indemnity. Article VI of the agreement deals with Transfer. Article VII of the agreement deals with Statues. Article VIII of the agreement deals with Force Majeure. Article IX of the agreement deals with Notices. Article X of the agreement deals with Arbitration which reads as follows:-

> "All disputes between the parties under this Agreement shall be referred to the award of two arbitrators, one to be nominated by the Board and one by the Licensee or in the case of the said arbitrators not agreeing to the award of the Umpire to be appointed by the said arbitrators and their decision shall be final and binding on the parties and the provisions of the Indian Arbitration Act 1940 and the Rules made thereunder shall apply to such references. The Arbitrators and the Umpire shall state the reasons for the award.
>
> The parties hereto agree that the High Court of Madras and the Courts in the City of Madras have jurisdiction for all legal actions arising out of this Agreement."

The agreement also contemplates other conditions. The appellant sent a letter dated 28.02.1997 to the respondent stating that there is certain violation of the terms of agreement and hence the respondent has to make the payments due to the Port as indicated in the letter, immediately, failing which the appellant will be constrained to issue a formal notice to terminate the agreement entered into with the respondent for awarding Licence to the respondent to operate 200m berth length at W.Q. I & II under the Berth Reservation Scheme. The respondent immediately sent a reply dated 01.08.1997 to the appellant denying the allegations and also enclosing a cheque for Rs.37,21,680/-, wherein it was stated as under:-

> "In view of the difference in perception of the agreement provisions leading to a dispute between Chennai Port Trust and X-Press Container Line on the issues relating to berth hire and penal levy in the

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Berth Reservation Agreement dated 18th January '95, we have appointed Mr.P.C.Tilak, 13 Norton 1st Street, Mandavali, Madras-600028, as our Arbitrator. We would request you to please nominate your Arbitrator at the earliest."

Later the respondent filed Original Petition No.292 of 2001 under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act" in short) before this Court, praying to appoint a second Arbitrator. The appellant resisted the petition. This Court, by order dated 28.09.2004, appointed a sole arbitrator. Aggrieved by the same, the appellant filed a Writ Petition in W.P. No.7692 of 2005 praying for issuance of a writ of certiorari calling for the records relating to the order of the Hon'ble Chief Justice dated 28.09.2004 in O.P. No.292 of 2001 and quash the same. The matter came up before this Court and this Court by order dated 08.03.2005 passed the following order:-

"Learned Senior Counsel for the petitioner relies on the judgment of this Court in M/s.Oil and Natural Gas Corporation Cauvery Project Vs. M.Gouthamchand Gothi reported in [1998(11) CTC 419) in support of this contention that when the application is beyond the period of limitation, the authority cannot appoint an Arbitrator.

Interim stay. Notice."

Later, this Court by order dated 13.06.2005, made the following order:-

"Since if the interim stay is vacated, nothing survives in the writ petition, the interim stay already granted is made absolute."

Aggrieved by the order, the respondent filed a Writ Appeal in W.A. No.1459 of 2005, against which the following order has been passed by this Court:-

"Both sides agree for the appointment of a third arbitrator. Accordingly a third arbitrator will be appointed by

(1) the Arbitrator appointed by the Contractor

(2) the Arbitrator appointed by the Court.

This appointment of the third Arbitrator should be done by the aforesaid two Arbitrators expeditiously and the Arbitral proceedings should also go on expeditiously. The question of Limitation or any other question can be raised before the Arbitrators. The Writ Appeal as well as the connected Writ Petition, from which the present appeal has arisen, are disposed of finally. Connected W.A.M.P. Nos.3124 and 2708 of 2005 are closed."

Subsequently, the respondent filed a Claim Statement before the Arbitrators and requested the Arbitrators to make an award as follows:-

"i. that the sum of Rs.1,37,28,608.47 being the amount due to the Claimant from the Respondent, as more particularly set out in the Claimant's claim summary, be refunded to the Claimant;

ii. that the Respondent pay to the Claimant interest at the rate of 18% on the sum of

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Rs.1,37,28,608.47 from September 1997 to November 2005 which works out to Rs.2,03,86,987.00.

iii. that the Respondent pay to the Claimant interest at the rate of 18% on the sum of Rs.1,37,28,608.47 from September 1997 to the date of payment of all sums due by the Respondent.

iv. that besides the berth hire charges, the Respondent shall be obliged to refund all other charges collected from other vessels which the Respondent had berthed at West Quay I & II during the pendency of the Agreement.

v. that the Respondent pay the costs of the Arbitral Proceedings; and

vi. that the Hon'ble Arbitrator pass such further or other orders as it may deem fit and proper in the circumstances of the case."

The appellant has filed a counter affidavit before the Arbitral Tribunal and prayed as follows:-

"a) reject the claim upto 1.8.1997 of the Respondent / Claimant made in the claim petition and covered under the letter of request / reference dated 1.8.1997 as barred by law of limitation.

b) to reject the claim made by the Respondent / Claimant subsequently to 1.8.1997 as beyond the jurisdiction of the Arbitral Tribunal.

c) and pass such further or other orders as this Honourable Arbitral Tribunal may deem fit to pass and thus render justice."

Later the appellant filed a petition under Section 16 of the Act, on the preliminary issue of Limitation. After hearing both the parties, the Arbitral Tribunal rejected the petition. Aggrieved by the order, the appellant filed the present appeal under Section 37 of the Act, questioning the validity of the impugned order of the Arbitral Tribunal, praying to set aside the order of the Arbitral Tribunal relating to the preliminary issue of limitation in respect of the disputes arising out of Agreement for Berth Reservation dated 18.01.1995 and dismiss the claim petition in relation to claim up to 01.08.1987 as barred by limitation. This Court admitted the appeal and also granted interim stay in M.P.No.1 of 2007 on 25.01.2007. Aggrieved by the grant of stay, the respondent filed a petition for vacating the stay in M.P.No.2 of 2007 in M.P.No.1 of 2007 and the same was taken up for hearing on 22.02.2007. After hearing the arguments, the Court dismissed the vacate stay petition and the stay granted on 25.01.2007 was made absolute. Aggrieved, the respondent filed an SLP before the Supreme court against the order dated 22.02.2007 in M.P.No.1 of 2007. The Supreme Court granted stay by its Order dated 09.07.2007 in Civil Appeal No.2944 of 2007 (arising out of SLP(C) No.5660 of 2007), and passed the following order:-

"Leave granted.

Heard the parties.

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> The order assailed in this appeal is dated 22.02.2007 passed by the High Court making an interim order dated 25.01.2007 absolute.
>
> It is contended by Mr.C.A.Sundaram, learned senior counsel for the appellant that although many grounds have been raised and the parties are heard, the High Court has made an interim order 25.01.2007 absolute by a cryptic order dated 22.02.2007.
>
> Without adverting to the contention of the parties, we dispose of this appeal by requesting the High Court to decide the issue of the maintainability of the appeal within one month from today. In the meantime, the arbitration may proceed and the award may be pronounced but such award shall not be put into execution till the maintainability of the appeal is decided.
>
> With the aforesaid direction, the appeal is disposed of."

In view of the above order of the Supreme Court, the present matter is taken up for deciding whether the appeal is maintainable or not.

3. Learned Additional Solicitor General of India appearing for the appellant submitted that the order of the Arbitral Tribunal is wrong, illegal, without basis and justification. It is further submitted that the cause of action arose on 01.08.1997 and the request for appointment of arbitrator was made only on 30.12.2000 which is beyond the period of 3 years and that therefore, it is clearly barred by limitation. Once it is barred by limitation, the Arbitral Tribunal has no jurisdiction to continue with the arbitral proceedings. It is further submitted that the Arbitral Proceedings being original proceedings, there is no question of invoking Section 5 of the Limitation Act for condoning the delay. It is also further contended that the Arbitral Tribunal ought to have seen that it is the duty of the respondent to bring to the Hon'ble Chief Justice the fact of delay by a separate application under Section 5 of the Limitation Act which had not been done and yet in the absence of such an application before the Chief Justice and even before the Arbitral Tribunal, the action of the Arbitral Tribunal in suo-motu condoning the delay under Section 5 of the Limitation Act without any application and without reasons given by the respondent herein explaining the delay, amounts to illegality and also is an apparent error and hence the order of the Tribunal is perverse, illegal, without basis and justification. As the Arbitral Tribunal has exceeded its jurisdiction, the appellant is right in filing appeal to challenge the illegal order and therefore, it is maintainable. It is also further submitted that the appellant need not wait till the award is passed and then challenge the award by filing an application under Section 34 of the Act, which amounts to nothing but futile exercise. Here the Tribunal passed the order on 11.10.2006 duly signed by all the Arbitrators, but there is a note at the end of the order which reads as follows:-

> "Subject to Joint Note dtd. 11.10.06 appended by Co-Arbitrators".

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The procedure followed by the Tribunal is illegal and it only indicates that the Tribunal went beyond its jurisdiction. Hence the counsel strenously contended that the appeal filed by the appellant under Section 37(2)(a) of the Act is maintainable and it is in accordance with law and further relied on the following judgments to support his contention:-

a) State of Tamil Nadu v T.Dhilipkumar and Others, 2001 (8) SCC 700
b) Meghraj v Jesraj Kasturjee and another, AIR 1975 MADRAS 137
c) Suresh Kumar and Others v Firm Kurban Hussain Taiyab Ali and Others, AIR 1996 M.P. 151

4. Learned counsel appearing for the respondent submitted that the appeal is not maintainable under Section 37(2)(a) of the Act. When the petition filed under Section 16(3) of the Act is rejected, the appellant has to wait till the final order is passed and then only they can challenge the award by filing application under Section 34 of the Act. The remedy as well as the manner is provided specifically under Section 16 (6) of the Act. Hence, filing an appeal under Section 37(2)(a) of the Act is not maintainable. If any petition is rejected under Section 16(2) or 16(3), the Arbitral Tribunal has to continue with the arbitral proceedings and make an award under Section 16(5) of the Act. Hence Section 16 is a complete code by itself. The appellant cannot bypass the said provision and hence the appeal filed by the appellant is not maintainable under Section 37(2)(a) of the Act. Learned counsel appearing for the respondent also relied on the following judgments to support his contention:-

a) BASF Styrenics Pvt. Ltd. v Offshore Industrial Construction Pvt. Ltd. and another, AIR 2002 BOMBAY 289.
b) Harinarayanan G.Bajaj v Sharedeal Financial Consultants Pvt. Ltd., Mumbai and another, AIR 2003 BOMBAY 296.
c) M.Mohan Reddy v Union of India and others, 2000(1) Arb. LR 39 (A.P.).
d) Nirma Ltd. v Lurgi Energie Und Entsorgung GMBH, Germany and Others, AIR 2003 GUJARAT 145.
e) Union of India and another v M/s.East Coast Boat Builders & Engineers Ltd., AIR 1999 DELHI 44.
f) Shriram Investment Services Limited v Palki/Jeypad Investment (P) Ltd., (2006) 4 M.L.J. 743.

5. Heard the counsel. In view of the direction of the Supreme Court, both the counsel made their submissions only in respect of the maintainability of the appeal. The Arbitration and Conciliation Act, 1996 has been brought into force with effect from 22.08.1996. The main objectives as enumerated in the Bill are as under:-

> "(i) to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
> (ii) to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration.
> (iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

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(iv) to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
(v) to minimise the supervisory role of Courts in the arbitral process;
(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;
(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court;
(viii) to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
(ix) to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two international Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

The Act consists of four parts. Part I deals with arbitration. Part II deals with enforcement of certain foreign awards. Part III deals with conciliation. Part IV deals with supplementary provisions. Part I consists of 10 chapters. Chapter I deals with General Provisions. Chapter II deals with Arbitration Agreement. Chapter III deals with Composition of Arbitral Tribunal. Chapter IV deals with Jurisdiction of Arbitral Tribunals. Chapter V deals with Conduct of Arbitral Proceedings. Chapter VI deals with Making of Arbitral Award and Termination of Proceedings. Chapter VII deals with Recourse against Arbitral Award. Chapter VIII deals with Finality and Enforcement of Arbitral Awards. Chapter IX deals with Appeals. Chapter X deals with Miscellaneous. Section 5 comes under Chapter I, which deals with Extent of Judicial Intervention and the same reads as follows:-

"5. Extent of judicial intervention.-Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

One of the main objectives of the provision is to minimise the supervisory role of Courts in the arbitral process and the judicial review is available only to challenge the award in accordance with the procedure laid down under the Act. The question of jurisdiction of the Arbitrator also should be considered only after the award is passed and not at any penultimate stage by the appropriate Court. Seeing the object as well as the intention, it is evident that the judicial scrutiny or intervention could be made only in the manner provided under the Act. The Apex Court in the case of Babar Ali v Union of India and others, (2000) 2 SCC 178, considered the vires of the provision of the Act and scope of Section 16 of the Act and held as follows:-

"We find that there is no question of the Arbitration

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and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India, as the High Court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. Only because the question of jurisdiction of the arbitrator is required to be considered after the award is passed and not at any penultimate stage by the appropriate court, it cannot be a ground for submitting that such an order is not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by Parliament. The challenge to the vires of the Act was rightly rejected by the High Court. We fully endorse that view."

In the case of P.Anand Gajapathi Raju and Others v P.V.G.Raju and Others, (2000) 4 SCC 539, the Apex Court considered the scope of Section 5 of the Act and held as follows:-

"Part I of the new Act deals with domestic arbitrations. Section 5, which is contained in Part I of the new Act, defines the extent of judicial intervention in arbitration proceedings. It says that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I, no judicial authority shall intervene except where so provided in that Part. Section 5 brings out clearly the object of the new Act, namely, that of encouraging resolution of disputes expeditiously and less expensively and when there is an arbitration agreement, the court's intervention should be minimal."

In view of the above Supreme Court judgments, whenever there is arbitration agreement, the Court's intervention should be minimal and also the Court shall only intervene in the manner provided under the Act. Chapter IV of the Act deals with jurisdiction of Arbitral Tribunals and Sections 16 and 17 are the relevant provisions. The Apex Court in the case of Gas Authority of India Ltd. & another v Keti Construction (I) Ltd. and others, 2007 (4) CTC 435, considered the scope of the preamble of the Arbitration and Conciliation Act, 1996 as well as Article 16 of the UNCITRAL Model Law which corresponds to Section 16 of the Arbitration and Conciliation Act, 1996, and held at paragraphs 17 and 18 of its order, as under:-

"17. It will be useful to take note of the preamble of the Arbitration and Conciliation Act, 1996 which reads as under:-

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model law on International Commercial Arbitration in 1985;

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of

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international commercial arbitration practice;
AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;
AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;
AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;
AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;
The Preamble of the Act makes it amply clear that the Parliament has enacted the Arbitration and Conciliation Act, 1996 almost on the same lines as the Model Law, which was drafted by United Nations Commission on International Trade Law. In Sundaram Finance Ltd. v. NEPC Ltd., AIR 1999 SC 565, it has been observed that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law. Article 16 of the Model Law, which corresponds to Section 16 of the Act, is being reproduced below:
UNCITRAL Model Law
"Article 16. Competence to rule on own jurisdiction.-
(1) The Arbitral Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For the purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
(2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.
(3) The Arbitral Tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the

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Arbitral Tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award."

The commentary on the three paragraphs of the Model Law has been given under the headings A, B, C and D. Note 1 under heading A and Note 11 under heading D, which are relevant for the controversy in hand, are being reproduced below:

"A. "Kompetenz-kompetenz" and separability doctrine, paragraph (1).

1. Article 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself to determine whether it has jurisdiction, subject to ultimate Court control (see below paras 12-14). Paragraph (1) grants the Arbitral Tribunal the power to rule on its own jurisdiction. Including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as "Kompetenz-kompetenz", is an essential and widely accepted feature of modern international arbitration but, at present is not yet recognised in all national laws.

D. Ruling by Arbitral Tribunal and judicial control, paragraph (3) [Corr. to Section 16(5), (6)]

11. Objections to the Arbitral Tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with partial or complete decision on the merits of the case. Article 16(3), therefore, grants the Arbitral Tribunal discretion to rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits.

So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India shows that where a party asserts that the arbitral tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the Arbitral Tribunal right at the beginning and normally not later than in the statement of defence.

18. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the arbitral tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the arbitral tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the arbitral tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly

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illustrates the aforesaid legal position."

Section 16 of the Arbitration and Conciliation Act, 1996 reads as follows:-

> "16. Competence of arbitral tribunal to rule on its jurisdiction.-(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
>
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
>
> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
>
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

In the present case, there is no dispute that the appellant filed a petition under sub-section (3) of Section 16 before the Arbitral Tribunal and contended that the claim petition filed by the respondent is barred by limitation. After considering the arguments advanced on behalf of both the sides, the Arbitral Tribunal rejected the contention and passed an order which reads as under:-

> "On this legal position the petitioner has lost its right to challenge the appointment of the arbitrator made by the Chief Justice, on the ground of limitation or any other ground as it was made admittedly after hearing both the parties. That apart, as we have already held though the respondent made the request to the Chief Justice beyond three years period of the limitation as enshrined in Art 137 of the Limitation

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Act since on facts we have condoned the delay the objection raised by the petitioner cannot be sustained.

In fine, the petition filed by the Madras Port Trust U/S 16 of The Arbitration and Conciliation 1996 is rejected. The arbitral proceedings will be continued as enshrined in Sec.16(5) of the 1996 Act and the Madras Port Trust is directed to file its Statement of Defence to the claim made by the respondent within four weeks from the date of receipt of this order."

From a reading of the above, it is clear that the Arbitral Tribunal had rejected the petition filed under Section 16. As per sub-section (2) of Section 16, a plea can be raised by the parties that the Arbitral Tribunal does not have jurisdiction to deal with the matter, but such plea should be raised not later than the submission of the statement of defence. Sub-section (3) of Section 16 emphasises that if the Arbitral Tribunal is exceeding the scope of its authority, the parties can raise the plea during the arbitral proceedings. Sub-section (5) of Section 16 is for deciding the objections raised under sub-section (2) or sub-section (3) of Section 16 and if the Arbitral Tribunal takes a decision rejecting the plea, still the Arbitral Tribunal can continue with the proceedings and make an arbitral award. Sub-Section (6) of Section 16 provides a remedy to the aggrieved party to make an application for setting aside the award in accordance with Section 34. Hence, Section 16 is a complete code by itself in respect of the jurisdiction of the Arbitral Tribunal. Chapter IX deals with appeals. Section 37 of the Act reads as follows:-

"37. Appealable orders.-(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;

(b) setting aside or refusing to set aside an arbitral award under section 34.

(2) An appeal shall also lie to a Court from an order of the arbitral tribunal-

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

The appellant filed an appeal under Section 37(2)(a) of the provision. The said sub-section states that the appeal shall lie to a court from an order of the Arbitral Tribunal if the Arbitral Tribunal is accepting the plea referred to in Sub-section (2) or sub-section (3) of Section 16. In the present case, the Arbitral Tribunal rejected the plea and once the Arbitral Tribunal rejected the plea, no appeal lie under Section 37(2) of the Act. If the Arbitral Tribunal accepts the plea, then only the other

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party can file an appeal.

6. The other argument of the learned Additional Solicitor General of India appearing for the appellant is that the procedure adopted by the Arbitral Tribunal is very strange and not in accordance with the well known procedure. At the end of the order, there is a note showing that the order is "Subject to Joint Note dtd. 11.10.06 appended by Co-Arbitrators". On the same day, the other Arbitrators also have given their consent for the rejection of the petition filed under Section 16 of the Act. All the Arbitrators have signed the order and hence I do not find any procedural illegality or error in the order of the Arbitral Tribunal. The finding of the Arbitrators is that, it is not barred by limitation and the same was considered in the Note recorded by the Co-arbitrators which reads as under:-

> "RULING OF THE ARBITRAL TRIBUNAL ON THE PRELIMINARY OBJECTION RAISED BY THE PETITIONERS, THE BOARD OF TRUSTEES OF THE PORT OF CHENNAI UNDER SECTION 16 OF THE ARBITRATION AND CONCILIATION ACT, 1996.
>
> Note recorded by the co-arbitrators, Mr.V.Subramanian and Mr.T.R.Gopalakrishnan, which will form part of the ruling.
>
> ...
>
> b) The cause of action, which is not disputed, arose on 1.8.1997. Subsequently, at a meeting of the Advisory Committee of the Madras Port Trust, presided over by the Chairman of the Port Trust, held on 4.4.2000, it was acknowledged that refund claims of the claimant in respect of berth hire charges had been decided and refund of excess penalty had been worked out and settlement would be made shortly. This is a categorical acknowledgement of liability and under Sec.18 of the Limitation Act, 1963, a "fresh period of limitation shall be computed from the time when the acknowledgement was so signed." Going by the statute, the request of the claimant made in the writ petition dated 30.10.2000 for appointment of arbitrator should be considered well within time and is not barred by limitation."

From a reading of the above, it is clear that the Arbitral Tribunal only rejected the petition filed under Section 16 of the Act. In view of the same, the appellant cannot file an appeal under Section 37(2)(a) of the Act and hence the same is not maintainable.

7. Various judgments relied on by the learned counsel appearing for the respondent cited supra, have considered the scope of Sections 5, 16 and 37 of the Act. In the case of BASF Styrenics Pvt. Ltd. v Offshore Industrial Construction Pvt. Ltd. and another, AIR 2002 BOMBAY 289, a Division Bench of the Bombay High Court considered the scope of Section 16 and Section 37 of the Act and held as under:-

"7. So far as the Act is concerned, Section 16 confers

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jurisdiction on arbitral Tribunal. Sub-section (1) specifically declares that the arbitral tribunal may rule on its own jurisdiction, including an objection with respect to the existence or validity of the arbitration agreement, etc. sub-section (2) states that the plea that the arbitral tribunal does not have jurisdiction shall be raised at a particular stage.

"8. Sub-sections (5) and (6) are relevant and they read as under:-

> "(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
>
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

9. Section 37 provides for appeals, and sub-section (2) of the said section expressly and specifically states that an appal shall lie against an order accepting the plea referred to in sub-sections (2) and (3) of Section 16, which state that where the Arbitrator has come to the conclusion that it has no jurisdiction.

10. In our considered opinion, therefore, the scheme of the Act is clear, and it is that if the the arbitral Tribunal holds that it has jurisdiction, such an order cannot be said to be illegal or without jurisdiction at that stage, inasmuch as the competent Legislature has conferred the power on arbitral Tribunal "to rule on its own jurisdiction." Hence, such an order can be challenged only in the manner laid down in sub-sections (5) and (6) of S. 16, viz., after the arbitration proceedings are over and the award is made. If, on the other hand, it holds that it has no jurisdiction, an order can be challenged under sub-section (2) of Section 37 of the Act.

...

14. It was then contended that the Arbitrator was biased. In this connection, reference was made to some of the communications between the appellant, on the one hand, and reply by the Arbitrator, on the other hand. We may state that we express no opinion on that question, as we are of the view of that the Arbitrator has jurisdiction in the matter and the arbitration proceedings could go on. After the award is passed, it can be challenged in the manner laid down in Section 16 of the Act. We, therefore, make it clear that we may not be understood to have expressed any opinion on the second question. As and when the question will arise for consideration at an appropriate stage, the same will be considered, dealt with and decided in accordance with law."

From a reading of the above judgment, it is clear that only after the award is passed, the same can be challenged in the manner laid down in

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Section 16 of the Act. In the case of Harinarayanan G.Bajaj v Sharedeal Financial Consultants Pvt. Ltd., Mumbai and another, AIR 2003 BOMBAY 296, the learned Single Judge of the Bombay High Court considered the scope of Sections 16, 27, 34, 2(c) and 37 of the Act and held at Paragraph 3 of the judgment as follows:-

> "3. The Act of 1996 under S. 16 has conferred a power on the Arbitral Tribunal to rule on its own jurisdiction. It is necessary to advert to this provision for assistance to enable the Court to find out whether the order passed under S. 16 would amount to an award considering the argument advanced. An order /decision under S. 16 is an order in respect of which an Appeal is provided under S. 37 of the Act of 1996. The power under S. 16 is the power in the Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of an arbitration agreement. In other words, issues pertaining to jurisdiction will be the subject matter of an order or decision under S. 16. In the event the Tribunal comes to a conclusion that it has no jurisdiction, the remedy under the Act is conferred under S. 37 which is an Appeal. If the Tribunal holds that it has jurisdiction that order or decision does not become final, but such order / decision can be subject to a challenge when the Award is finally challenged under S. 34. Section 34 provides that recourse to a Court against an Arbitral Award may be made only by an application for setting aside such an Award. It is, therefore, clear from the reading of S. 16 of the Act of 1996 that a decision that the Arbitral Tribunal has no jurisdiction or that there is no arbitral dispute, under the Act is not treated as an award. There is also no deeming fiction by which it is taken out from the definition of award. It is an order which if it culminates in the closure of proceedings an appeal is provided. If it does not terminate the proceedings, that order/ decision can be challenged when the Award itself is challenged. That is how on a proper construction or reading of that Section the nature of the order will have to be considered."

The Single Judge also considered the scope of Section 5 in Paragraph 4 and held that no judicial authority shall intervene except where so provided under Part I of the Act. It was also held that the Court can intervene only if a power is conferred on the Court to interfere with the order or award and not otherwise. Further it has been categorically held that all orders or decisions by the Arbitral Tribunal are not subject to challenge under the Act of 1996. The Andhra Pradesh High Court in the case of M.Mohan Reddy v Union of India and others, 2000(1) Arb. LR 39 (A.P.), considered the scope of Sections 16(5), 34 and 37 of the Act and held as

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follows:-

> "While the ground of bias is a ground enumerated in sub-section (5) of Section 13 for challenging the award under Section 34, the other grounds like the adverse order regarding the competence of the Arbitrator to arbitrate on the subject matter is a ground for setting aside the award on invoking Section 34, under sub-section (6) of Section 16 of the Act. It is needless to mention that party seeking arbitration and appointing Arbitrator is estopped from raising the plea of bias against the Arbitrator even at a later point of time. He is entitled to invoke the appeal remedy under Section 37(1)(a) should the Arbitrator rule against him, holding that he does not have jurisdiction, upholding the plea of the party subjected to the arbitration thus, resulting in termination of arbitration proceedings. The intelligible differentia stares at us in providing such an appeal at the threshold, as without deciding the competence first, it is not desirable that Arbitrator should proceed with the enquiry and once the Arbitrator rules that he has got jurisdiction to deal with the matter, the party subjected to arbitration is not left remediless, but he has to wait and invoke Section 34 for setting aside the award, if he feels aggrieved. On the other hand, if the party subjected to arbitration is given an appeal at the threshold, as is given to the party seeking arbitration, entire proceedings will be stalled and it may take years to finally decide the same because of the hierarchy of the authorities and if ultimately it is held that the Arbitrator has competence to deal with the matter, the proceedings have to restart, which will certainly entail in delay. As already stated above, Central Act 26 of 1996 has aimed at consolidating the law of arbitration, both domestic and foreign and to cut short the procedural aspects for providing speedy and efficacious remedy and not providing of appeal against one such step in aid of faster disposal of the arbitral proceedings, and by the by giving opportunity to the party aggrieved to question the award under Section 34 of the Act. The only thing is that the party has to wait till the award is rendered and is not given that traditional right of interrupting the proceedings at each stage of the proceeding. As such, there is a nexus for the object to be achieved i.e., speedy disposal of the arbitration proceedings and also the intelligible differentia as already mentioned supra."

The Gujarat High Court, in the case of Nirma Ltd. v Lurgi Energie Und Entsorgung GMBH, Germany and Others, AIR 2003 GUJARAT 145, also considered

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the scope of Sections 16 and 37 and held in Paragraph 13.1 of the judgment as under:-

> "13.1 The scheme of Sections 16 and 37 is such that the arbitral tribunal is empowered to rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction or a plea that the arbitral tribunal is exceeding the scope of its authority, has to be decided by the arbitral tribunal and, if it takes a decision rejecting that plea, it is duty-bound to continue with the arbitral proceedings and make an arbitral award. And, the party aggrieved by such an arbitral award is permitted to make an application for setting aside the arbitral award in accordance with Section 34. Therefore, obviously, recourse is provided for challenging "such an award" which is made after the decision rejecting the plea regarding lack of jurisdiction or about arbitrators exceeding the scope of authority. The decision rejecting any of those pleas and the award made thereafter are clearly distinguishable and by no stretch can be considered to be synonymous for the purpose of Section 16. If the plea regarding jurisdiction or exceeding the scope of authority were accepted, an appeal from such a decision is expressly provided in sub-Section (2) of Section 37 where it is called "an order of the arbitral tribunal". Thus, the legislature has consciously and clearly considered the decision on jurisdictional aspect to be not an "award" but an "order" or a "decision". Similarly, even after taking into account the different provision in the UNCITRAL Model Law, the legislature has omitted to provide for an appeal from such decision. On the other hand, the award as distinguished from an order or a decision on jurisdiction or arbitrability is expressly permitted to be challenged in accordance with the provisions of Section 34. Therefore, a plea cannot be set up that such decision under sub-Section (5) of Section 16 would become final, binding and enforceable under Sections 35 and 36 of the Act."

The Delhi High Court, in the case of Union of India and another v M/s.East Coast Boat Builders & Engineers Ltd., AIR 1999 DELHI 44, considered the scope of Sections 5, 16(5), 34(2)(iv) and 37 of the Act and held as under:-

> "18. If an order on the point of jurisdiction of the arbitral tribunal was to be an interim award under the Act, Section 37 of the Act would not have provided for appeal against an order whereby the arbitral tribunal holds that it has no jurisdiction. While enacting Section 16 of the Act, the legislature was conscious that the arbitral tribunal could hold in its favour or against itself on the point of jurisdiction. If the

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legislature had to treat an order under Section 16 to be an interim award, it would not have provided for an appeal under Section 37 where the arbitral tribunal allows the plea that the arbitral tribunal does not have jurisdiction and the legislature would have left challenge to such order as well under Section 34 of the Act. It cannot be accepted that the order under Section 16 would change its nature upon two different contingencies, that is to say, where the order rejects the plea of no jurisdiction it becomes an interim award and where the arbitral tribunal allows the plea of no jurisdiction it is not an interim award and only appealable. Therefore, it can be easily be interpreted that in either case it is only an interim order and not an interim award. Analogy of British law on the subject cannot be pressed into service because under the British Arbitration Act such order has been specifically termed as award whereas in the Indian Arbitration Act such order has not been so specifically termed.

19. From the scheme of the Act, it is apparent that the legislature did not provide appeal against the order under Section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any Court in their supervisory role.

20. Section 5 of the Act categorically provides that no judicial authority shall intervene except where so provided in Part I of the Act. On perusal of the provisions of Part I of the Act it is apparent that nowhere it is provided that a Court may intervene and entertain a petition challenging the order passed by arbitral tribunal under Section 16(5) taking a decision that the arbitral tribunal has jurisdiction to proceed with the arbitration case. In view of the prohibition contained in this Section, I refrain to interfere."

A learned Single Judge of the Madras High Court in the case of Shriram Investment Services Limited v Palki/Jeypad Investment (P) Ltd., (2006) 4 M.L.J. 743, considered the scope of Sections 16(2), (3) & (5) and 37 of the Act. In that case, the petitioner invoked the superintendence power vested with the High Court under Article 227 of the Constitution of India challenging the legality of the decision of Arbitral Tribunal to continue with the arbitration proceedings in a preliminary objection raised before the Arbitral Tribunal in taking decision with reference to the period of agreement and the legality of the continuation of the proceedings by the Arbitral Tribunal. The Court held that the Arbitral Tribunal is excluded

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from the purview of the powers vested in the High Court under Article 227 of the Constitution of India. It was further held that the petitioner has to wait till the final award is passed to enable him to question the same under the provision of Section 34 of the Act. Paragraph 22 of the above judgment reads as under:-

> "22. In this context, learned senior counsel for respondents has drawn the attention of this Court to the facts of the case Mangayakarasi Apparels Pvt. Ltd. v. Sundaram Finance Ltd. (supra), to show that in that case also, the revision was preferred as against the order of rejection of memo by one of the arbitrators appointed under the commercial transaction between the parties therein in terms of the bilateral hire purchase agreement entered into between them and therefore he has argued and in my opinion rightly that here in this case also, the rejection of the contention raised by the revision petitioner by the majority of Arbitral Tribunal in the impugned communication cannot be questioned by means of this revision petition under Article 227 of the Constitution of India. It follows that the revision petition has to be dismissed as not maintainable.
>
> ...
>
> 24. A careful perusal of the records of the case would disclose that the arbitrators who passed the impugned order upon the application filed by the revision petitioner heard both the parties and reserved the orders within the time stipulated in the arbitral agreement. However since the order was passed on 12.2.2005 to continue the arbitral proceedings referred to for arbitration, reserving the reasons to be assigned in the final award cannot be a ground to contend that the arbitral proceedings is barred by limitation. As has been held by the Apex Court in the decision referred supra, the time should be taken as extended on account of the conduct on the part of the revision petitioner in filing the application before the arbitral proceedings questioning the very agreement of the constitution of the Arbitral Tribunal itself on various grounds. In any view of the matter, the revision petitioner has to wait till the final award is passed so as to enable him to question the same under the provision of Section 34 of the Act 26 of 1996.".

From a reading of the above judgments, it is evident that the Courts have consistently held that the Court's intervention in the arbitration matters should be minimal. Also, the intervention of the Court in Arbitration Proceedings should be in accordance with the time and manner laid down under the provisions of the Act. In the present case, the appellant filed

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a petition under Section 16(3) of the Act before the Arbitral Tribunal. After considering the arguments advanced on behalf of both the sides, the Arbitral Tribunal rejected the contention. Section 16(5) of the Act specifically emphasises that after the rejection, the Arbitral Tribunal has to continue with the arbitral proceedings and make an award. Sub-section (6) of Section 16 states that any person aggrieved by such an arbitral award may make an application to set aside such an arbitral award under Section 34. In the event the Tribunal comes to the conclusion that it has no jurisdiction, the remedy under the Act is conferred under Section 37, which is an appeal. Hence the filing of appeal under Section 37(2)(a) of the Act is not maintainable.

8. The judgments relied on by the appellant (cited supra) to support their claim have no relevance to the present case and hence the same are not considered.

9. In view of the foregoing reasons, the Civil Miscellaneous Appeal is not maintainable and is therefore, dismissed. It is needless to add that whatever observations made above, shall not be construed as an expression of opinion on the merits of future proceedings of any nature, if any between the parties. No costs.

km

sd/-
Asst.Registrar

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Sub Asst.Registrar

To
1. Arbitral Tribunal,
   Chennai.

2. The Section Officer,
   VR Section,
   High Court, Chennai-600 104.

3. The Arbitrator,
   Mr.Justice Malai Subramaniam (Retd).,
   Thendral Colony, Anna Nagar,
   Chennai.40

+ 1 CC TO MR.T.Poornam Advocate SR.NO.62329
+ 1 CC TO MR.P.Wilson, Asst.Solicitor General of India SR.NO.62380

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